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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TERALD ANTONIO WALTHOUR, Defendant and Appellant.	D059410 (Super. Ct. No. SCD231105)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed as modified.

A jury convicted Terald Antonio Walthour of evading an officer with reckless driving. (Count 1; Veh. Code § 2800.2, subd. (a).) The court sentenced Walthour to the middle term of two years and imposed several fines and fees including a $400 restitution fine, $40 court security fee, $30 criminal conviction assessment, $154 booking fee, and $30 for the immediate critical needs account. The court also sentenced Walthour to an eight-month consecutive term for violating probation in case No. SCN176196. Walthour

received credit for 206 days in connection with count 1 and 149 days of credit in connection with case No. SCN176196.

Walthour contends the court erred by: (1) sentencing him to prison because he exercised his constitutional right to a jury trial; (2) not giving proper credit for pretrial custody served; (3) imposing a booking fee without considering his ability to pay the fee; and (4) imposing an immediate critical needs account (ICNA) fee without providing statutory authority for the fee. Walthour also asserts the ICNA fee amount of $33 in the abstract of judgment does not reflect the $30 fee announced in court. We conclude the court did not err in its imposition of the two-year prison sentence and Walthour forfeited his claim challenging the booking fee. However, we agree with Walthour's contentions regarding custody credits and the ICNA fee.

FACTS

On December 3, 2010, Walthour evaded three California Highway Patrol officers while driving his motorcycle in a high-speed chase that spanned 15 to 20 miles on three San Diego freeways. Walthour drove at speeds in excess of 100 miles per hour and weaved in and out of early evening traffic, causing other drivers to brake or swerve. Walthour was ultimately stopped when approached by two other officers and his motorcycle ran out of gas. A large portion of the pursuit was recorded by two of the officers' mobile video recording systems (MVARS), including the end of the pursuit when Walthour was ultimately detained. The third officer in pursuit, Joshua Cook, drove Walthour to a nearby parking lot where the first officer in the pursuit, Kevin Iden,

identified Walthour, and the officers determined that he had been driving with a suspended license.

The San Diego County District Attorney filed a complaint against Walthour, charging him with one count of evading an officer with reckless driving. (§ 2800.2, subd. (a).) Before trial, the People presented Walthour with a plea bargain offer of probation in exchange for a guilty plea that Walthour did not accept. Although he denied any involvement with the chase, the jury convicted Walthour of the offense.

At sentencing, the court denied his request for probation. When Walthour suggested the People's pretrial probation offer showed probation was appropriate in the case, the court noted that he did not accept the offer and said "[the court] told you at that time that if [you] didn't accept that probation offer, that that was not to be something that was going to be advanced after a trial and after a conviction."

In determining Walthour's sentence, the court acknowledged he was eligible for probation, but ultimately relied on various other factors in aggravation to impose the two-year prison term. The court delineated the four factors it relied on, including: (1) the fact Walthour previously violated probation terms and has had a warrant out for his arrest since 2005; (2) Walthour's "significant prior record of criminal conduct, a prior auto theft, and a prior record of traffic-related matters"; (3) the nature and circumstances of the case, including the time of the incident, the heaviness of traffic, and that Walthour was reckless and dangerous; and (4) Walthour's lack of remorse and denial of responsibility for the actions recorded on videotape. The court selected the middle term for the offense

because it did not find any factors in mitigation and did not find enough factors in aggravation to warrant the aggravated term.

After imposing sentence, the court noted Walthour had a total of 206 days of credit for time already spent in custody. It also imposed a number of fines and fees, including a $400 restitution fine, a $40 court security fee, a $30 criminal conviction assessment fee, and a $154 booking fee. The court then asked if it was missing any fees and the probation officer said, "No." The court replied "[a]ll right . . . [t]he immediate critical needs account for $30." All of these fees were included in the abstract of judgment. However, the ICNA fee is listed as $33 instead of the announced $30.

DISCUSSION

I

Relying on the court's statement regarding the lapsed probation offer and *In re Lewallen* (1979) 23 Cal.3d 274 (*Lewallen*), Walthour contends the court erred by imposing the prison sentence because of his decision to reject the plea bargain probation offer and exercise his Sixth Amendment right to a jury trial. Preliminarily, we note Walthour forfeited this issue by not raising it in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 348 [complaint of improper sentencing factors must be made for the first time in the trial court] (*Scott*).) In any event, the court's statements do not suggest there was any error.

The sentencing court "may not . . . impose a sentence that conflicts with a defendant's exercise of his constitutional right to a jury trial" (*Lewallen, supra,* 23 Cal.3d

at p. 281) and "[i]t may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right." (*People* v. *Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270, 276; *Lewallen*, at pp. 278-279.) However, there is not an "absolute ban on [the] imposition of a sentence higher than that which might have been proposed before the defendant asserted his constitutional . . . right" (*People v. Angus* (1980) 114 Cal.App.3d 973, 989), and the defendant must present evidence to this court that suggests "the higher sentence was imposed as punishment for exercise of the right." (*Id.* at p. 990.)

In *Lewallen*, the court held the sentence was improper because the sentencing court had specifically stated, " 'if a defendant wants a jury trial and he's convicted, he's not going to be penalized with that, *but* on the other hand he's not going to have the consideration he would have had if there was a plea.' " (*Lewallen*, *supra*, 23 Cal.3d at p. 277, italics added.) The court reasoned that in considering these statements, "there [could] be no rational interpretation other than that [the court] was basing [defendant's] sentence at least in part on the fact that he declined the prosecution's plea bargain and demanded a trial by jury." (*Id.* at p. 280.)

Here, the court's statement, when considered in context, does not suggest any impropriety. When Walthour requested probation at sentencing, the court openly and continuously questioned him and commented on his arguments. The court noted Walthour had "been in the wind for five years" on his previous probation case, had not complied with those probation terms, and that the nature of the current offense "suggests

that he is somebody who will at all times flee from responsibility for his actions." After Walthour specifically referenced the prosecution's probation offer, the court stated "[the court] told you at that time that if [you] didn't accept that probation offer, that that was not to be something that was going to be advanced after a trial and after a conviction." This shows the court continued its ongoing discussion with Walthour about probation and clarified the fact that the probation offer would not be renewed again after trial. The statement does not suggest that the court wanted to treat Walthour more harshly for exercising his Sixth Amendment right. (*People v. Superior Court* (*Felmann*), *supra,* 59 Cal.App.3d at p. 276; *Lewallen, supra,* 23 Cal.3d at pp. 278-279.)

The court then sentenced Walthour based on his previous violation of his probation terms; the outstanding five-year warrant for his arrest; his "significant prior record of criminal conduct, a prior auto theft and a prior record of traffic-related matters"; the nature and circumstance of Walthour 's reckless and dangerous actions; his lack of remorse; and his denial of responsibility for the actions recorded on videotape. Under these circumstances, Walthour's claim that the court imposed a prison sentence based on his exercise of his Sixth Amendment right to a jury trial is not persuasive.

II

Walthour correctly contends he is entitled to two additional presentence custody credits. The People concede this point, and we agree. Accordingly, Walthour is to receive credit from his date of arrest on December 3, 2010, until the date of his sentencing on March 16, 2011 (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30), for a total

of 208 days of presentence credit. The abstract of judgment should be amended to reflect this change.

III

Walthour also contends the court erred by imposing the $154 booking fee without first determining his ability to pay. The People argue Walthour did not object to the imposition of the fee at sentencing and, thus, he has forfeited the issue on appeal.

Currently, there is a split of authority on the issue of whether the forfeiture doctrine applies in the context of challenges to the imposition of jail booking fees. (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [holding forfeiture doctrine applicable]; *People v Gibson* (1994) 27 Cal.App.4th 1466, 1467-1468 [holding forfeiture doctrine applicable]; *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [holding the doctrine inapplicable].) The issue is currently pending review in the California Supreme Court. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513 [whether failure to object to imposition of a jail booking fee forfeited a sufficiency of the evidence of ability to pay claim on appeal].)

Without the Supreme Court's definitive decision on the matter, we follow the precedents holding that challenges to sentencing decisions must be made in the trial court and the underlying rationale that fairness and efficiency require defendants to make such challenges initially in trial courts. (*People v. Hodges, supra,* 70 Cal.App.4th at p. 1357; *People v Gibson, supra,* 27 Cal.App.4th at pp. 1467-1468.) "The purpose of the [forfeiture] doctrine is to bring errors to the attention of the trial court so they may be

corrected or avoided" (*Gibson,* at p. 1468; *People* v. *Walker* (1991) 54 Cal.3d 1013, 1023), and it is especially important in situations involving fact-specific inquiries because the People should be afforded the opportunity at trial to provide more evidence. (*Gibson,* at p. 1468.) However, we also agree with courts that have followed a "narrow exception" to the doctrine by allowing claims regarding sentences that are unauthorized, void, excessive, or in excess of jurisdiction to be made for the first time on appeal. (*Scott, supra,* 9 Cal.4th at p. 354; *People v. Smith* (2001) 24 Cal.4th 849, 852.)

Here, Walthour did not object to the imposition of the fees at trial, and the $154 booking fee does not fall into the "narrow exception" to the forfeiture doctrine. (*Scott, supra,* 9 Cal.4th at p. 354.) Therefore, we decline to consider his claim regarding the booking fee.

IV

Walthour contends the court erred by imposing a $30 ICNA fee and, in addition, that the fee was improperly recorded in the abstract of judgment as a $33 fee. Walthour argues that because the court imposed the fee without providing any statutory authority for it in the record, there is no way of knowing whether the fee was lawfully authorized.

Government Code section 70371.5[1] establishes the ICNA of the State Court Facilities Construction Fund. Section 70371.5 does not describe any fees, but section 70373 mandates the Criminal Conviction Assessment fee, which funds the ICNA. (§ 70373, subds. (a)(1), (d).) Section 70373 imposes an assessment for every criminal

1 All further statutory references are to the Government Code.

conviction "in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction" "[to] ensure and maintain adequate funding for court facilities." (§ 70373, subd. (a)(1).) These assessments are then transferred for deposit into the ICNA. (§ 70373, subd. (d).) The sections do not mandate an independent fee for the ICNA, and section 70373 clearly states the ICNA is to be funded through the criminal conviction assessments. (§§ 70371.5, 70373.)

Here, the court imposed a $30 criminal conviction assessment and a $30 ICNA fee. The imposition of two separate fees for one felony conviction is not authorized by the statute. Only one $30 fee should have been imposed on Walthour for the criminal conviction assessment and then that fee would have been transferred to the ICNA. (§ 70373, subds. (a)(1), (d).)

Although Walthour did not object to the imposition of this fee in court, the claim is not forfeited on appeal because this fee is unauthorized and therefore falls into the "narrow exception" to the forfeiture doctrine. (*Scott, supra,* 9 Cal.4th at p. 354; *People v. Smith, supra,* 24 Cal.4th at p. 852.) It is not clear from the record whether the court was imposing the fee twice or simply reiterating the criminal conviction fee, but in any event the ICNA fee should be stricken from the abstract of judgment. Consequently, there is no need to address the inaccuracy of the fee amount in the abstract of judgment.

DISPOSITION

The calculation of presentence custody credit is modified to reflect a total of 208 days. The $30 ICNA fee is stricken as unauthorized. The trial court shall amend the

abstract of judgment as modified and advise the Department of Rehabilitation and Corrections of the modifications. In all other respects the judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.